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Soviet Prisoners in the Afghan Conflict

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Development

Soviet Prisoners in the Afghan Conflict

In May 1982, the International Committee of the Red Cross (ICRC) took a bold step toward improving the law governing civil war by concluding an agreement on the detention of prisoners of war in the Afghan conflict.¹ This agreement was necessary because there is little existing law covering civil war. In international wars, the full Geneva Conventions apply.² In riots and lesser domestic strife, human rights law applies.³ But civil wars fall in neither category, and for political and practical reasons, states have been unable thus far to develop an adequate legal regime to cover them.⁴ Prior to 1982, as a partial response to this gap in international law, the ICRC simply developed ad hoc agreements to facilitate prisoner exchanges during various civil wars.⁵

1. The ICRC has not published the text of this agreement; its existence is confirmed by various press reports. See, e.g., N.Y. Times, June 26, 1983, § 1, at 13, col. 1; Christian Sci. Monitor, Dec. 28, 1982, at 5, col. 1; two letters to the author from Mr. Mark Ita, legal advisor to operational activities of the ICRC, Dec. 28, 1983 and Mar. 20, 1984 [hereinafter cited as Ita, letter Dec. 28, 1983 and Ita, letter Mar. 20, 1984].

2. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364 [hereinafter cited as Geneva Convention III]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365.

Mr. Ita confirms in his Mar. 20, 1984 letter that the full Geneva Conventions do not apply to the Afghan conflict. Ita, letter Mar. 20, 1984, *supra* note 1.

3. Meron, *On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument*, 77 AM. J. INT'L L. 589, 603-04 (1983).

4. For discussions of the application of law to civil war, see generally J.E. BOND, *THE RULES OF RIOT* (1974); Farer, *Humanitarian Law and Armed Conflicts: Toward a Definition of 'International Armed Conflict'*, 71 COLUM. L. REV. 37 (1971); Draper, *The Implementation and Enforcement of the Geneva Conventions of 1949 and of the Two Additional Protocols of 1978*, in 164 RECUEIL DES COURS 9 (1979); Schindler, *The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols*, in 163 RECUEIL DES COURS 117 (1979).

5. See, e.g., a description of activities in the Namibian conflict in INTERNATIONAL COMMITTEE OF THE RED CROSS, ANNUAL REPORT, at 11-16 (1982).

Under the 1982 agreement, however, the ICRC finally went beyond a simple ad hoc exchange. Instead, it negotiated the release of Soviet prisoners from Afghan rebels for internment in Switzerland.⁶ The agreement is a creative innovation: it has kept men alive who might otherwise have been killed,⁷ and it may point the way to a solution to one legal problem of civil war. On the other hand, only nine of 200-300 prisoners held by the rebels have been helped under the agreement.⁸ Moreover, four or five of the nine have asked to remain in Switzerland rather than be repatriated to the Soviet Union, thus raising the difficult question of whether the prisoners may be forcibly repatriated under the terms of the agreement.⁹

I. INTERNATIONAL LAW IN CIVIL WAR

The civil war in Afghanistan, a brutal conflict in which both sides have been accused of atrocities, is a prime example of how and why international law has failed to restrain the conduct of parties in internal war.¹⁰ The Soviets and the rebels alike have killed their prisoners rather than hold them to the end of the fighting. Though it seems that the growing body of human rights law would prohibit most of this conduct, it is very unlikely that these or other states would ever invoke such law. Human rights law is largely unenforced in the best of times; and states have the legal right to derogate from their human rights obligations during a national emergency,¹¹ such as a civil war.¹²

Nor does the law applicable to international war apply during civil war. When the Hague and Geneva Conventions were negotiated, the ICRC proposed that they cover civil war,¹³ but the suggestion was soundly rejected by states out of concern for state sovereignty.¹⁴ Even

6. Ita, letter Dec. 28, 1983, *supra* note 1.

7. This benefit of the agreement was cited to the author by Dmitry P. Titov, Second Secretary of the Permanent Mission of the USSR to the United Nations on Feb. 10, 1984; it is the only information the author could obtain from the Soviet Union with regard to the agreement.

8. Christian Sci. Monitor, Dec. 28, 1982, at 5, col. 1.

9. Wall St. J., Nov. 9, 1983, at 31, col. 4.

10. Time, Jan. 9, 1984, at 37; Christian Sci. Monitor, Dec. 28, 1982, at 5, col. 1; Christian Sci. Monitor, Sept. 1, 1983, at 6, col. 1.

11. Meron, *supra* note 3, at 600-02.

12. Professor Meron is urging that a new convention be written to extend human rights protection to emergency situations. Others have made similar suggestions. *Id.*; see also Recent Developments, *Geneva Convention Signatories Clarify Applicability of Laws of War to Internal Armed Conflict*, 8 GA. J. INT'L & COMP. L. 941, 949 (1978).

13. Baxter, *Ius in Bello*, in *LAW AND CIVIL WAR IN THE MODERN WORLD* 518, 519 (J.N. Moore ed. 1974).

14. *Id.* In civil war, the incumbent government may be losing control over all or part of the state. The government does not want to admit this because to do so enhances the stature of

if the ICRC had persuaded states to extend international law to civil war it is not clear that such a change would do any good. Modern civil wars, like the Afghan conflict, often involve guerilla warfare. Guerillas rarely are in a position to implement the 550 articles of the Geneva Conventions. Since guerillas are frequently on the move and often have little food or water to spare, prisoners can be a burden and are often executed. This has certainly been true of the Afghan conflict.¹⁵

The ICRC, however, did not fail completely at Geneva. Four articles out of the 550 do apply to civil war. All four conventions have an identical article, sometimes called the "mini-convention" or "common article three."¹⁶ This common article, which will be referred to as Article Three, protects persons who take no active part in the hostilities, and was developed as a compromise between states that wanted some humanitarian law to cover armed conflict and states that did not want to enhance the status of rebels by developing a full convention to cover civil war. Article Three was kept short and simple to satisfy the anti-convention states,¹⁷ and by now probably has entered the body of customary law along with the rest of the Geneva Conventions so that all states are bound by its terms.¹⁸ Practically speaking, however, this has meant very little. Not a single state has ever acknowledged explicitly that it considers itself bound by Article Three while engaged in a civil war.¹⁹ Moreover, because Article Three is so

the insurgents, allowing them to persuade foreign countries and the indigenous population that eventually they will triumph and should be supported. By extending international law to civil war, governments would appear to be giving rebels the status of states, the very thing the government is fighting the war to avoid. Farer, *supra* note 4, at 66-67.

15. Christian Sci. Monitor, Dec. 28, 1982, at 5, col. 1.

16. The article in common states that:

In the case of armed conflict not of an international character . . . :

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples

17. For sources on the history of Article Three, see *supra* note 4.

18. Schindler, *supra* note 4, at 151.

19. Kilgore, *Geneva Convention Signatories Clarify Applicability of Laws of War to Internal Armed Conflict*, 8 GA. J. INT'L & COMP. L. 941, 949 (1978).

simple, it offers very little guidance to states on how to implement it during a civil war.²⁰ Article Three certainly does not answer the question of how guerillas should detain prisoners and consequently has had no impact on the Afghan conflict by its own force.

To solve some of Article Three's deficiencies, two additional protocols were adopted in 1977.²¹ Protocol I declares that wars of liberation are international, not civil wars. Therefore, most of the international law of war applies to wars of liberation.²² Protocol II has extended a number of protections to victims of civil war, especially civilians. For example, it forbids "starvation of civilians as a method of combat," requires that "detained persons may send and receive mail" and prohibits "acts of hostility against historic monuments."²³ Certain criteria must be met, however, before Protocol II applies. Article One requires that the dissident's armed forces must be organized, must have a commander, and must exercise control over enough territory "to enable them to carry out sustained and concerted military operations and to implement this protocol."²⁴ These criteria have had the result of excluding most civil wars from the scope of Protocol II. Indeed, even if the Soviet Union and Afghanistan were parties to the Protocol, it would not apply to the Afghan conflict. The rebels do control a significant amount of territory,²⁵ but they do not meet any of the other requirements.²⁶ So the very limited body of law on civil war, namely common Article Three and Protocol II of the Geneva Conventions, has no significant impact on the problem of prisoners in the Afghan conflict.

II. THE 1982 AGREEMENT

The agreement negotiated by the ICRC overcomes some of the obstacles preventing a full-fledged legal regime on civil war. First, regarding the sovereignty problem,²⁷ the ICRC is exceedingly discreet about the existence of the agreement. The text is unpublished,²⁸ thus

20. J. BOND, *supra* note 4, at 4-6, criticizing the simplicity of Article Three; Draper, *supra* note 4, at 26-27.

21. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 16 I.L.M. 1391 (1977) [hereinafter cited as Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 16 I.L.M. 1442 (1977) [hereinafter cited as Protocol II].

22. Protocol I, art. 1(4).

23. Protocol II, arts. 5, 14 & 16.

24. *Id.*, art. 1(1).

25. Time, *supra* note 10, at 37.

26. Christian Sci. Monitor, Sept. 1, 1983, at 6, col. 1.

27. See *supra* note 14 and accompanying text.

28. According to Mark Ita:

avoiding the impression that the Soviets are awarding the Afghan rebels international status by concluding a treaty with them. In fact, the agreement may not be a treaty at all—it may be a non-binding agreement, the sort of instrument made famous by the Helsinki Accords.²⁹ It is impossible to say what sort of agreement it is, or indeed, even who the parties are, since the ICRC has said almost nothing on either point. They have said only that it “is the result of negotiations conducted with all the parties involved and above all is based on the free will of the persons to whom the ICRC is giving assistance.”³⁰

Second, the agreement solves the problem of the guerillas’ inability to provide for large numbers of prisoners. The Geneva Conventions have several articles that probably inspired the ICRC to devise the arrangement for Afghanistan.³¹ In particular, Articles 12 and 110 of the Geneva Prisoners Convention allow transfer of prisoners of war to neutral countries under certain circumstances.³² In the 1982 agreement, Afghan rebels agreed to turn over to the ICRC Soviet prisoners in their custody. The Swiss government in turn agreed to detain these prisoners on behalf of the ICRC, which does not have the facilities to hold the prisoners itself. The Soviet Union will pay for the cost of internment, which is a departure from the Geneva Conventions; normally under Article 15 the detaining power pays all costs.³³ In exchange for allowing Swiss detention, the Kabul authorities agreed to allow the ICRC to inspect prisons in Kabul where rebels are being held in order to certify that conditions and treatment are humane.³⁴ The agreement may also contemplate an eventual exchange of prisoners, but no exchange so far has taken place.³⁵

Any Soviet soldier in the hands of the rebels will be interviewed by the ICRC and asked if he wants to go to Switzerland for two years or until the end of hostilities, whichever is sooner. Prisoners may have as many confidential interviews as they wish.³⁶ It must be a sol-

[I]t is the established policy of the ICRC not to disclose public documents of such a kind where the confidence and trust of the parties in the ICRC and the interests of the victims are involved. This policy of discretion enables the ICRC to gain the trust and confidence of all kinds of authorities and movements and thereby to fulfill its multiple tasks of bringing assistance and protection to the victims of armed conflicts throughout the world.

Ita, letter Dec. 28, 1983, *supra* note 1.

29. For a discussion of nonbinding agreements, see Schachter, *The Twilight Existence of Nonbinding Agreements*, 71 AM. J. INT’L L. 296-304 (1977).

30. Ita, letter Dec. 28, 1983, *supra* note 1.

31. Ita, letter Mar. 20, 1984, *supra* note 1.

32. Geneva Convention III, *supra* note 2, arts. 12 & 110.

33. *Id.* at art. 15.

34. Christian Sci. Monitor, Sept. 1, 1983, at 6, col. 1.

35. *Id.*

36. Ita, letter Dec. 28, 1983, *supra* note 1.

dier's own decision to go because "it is a fundamental principle of the ICRC never to act against the free will of the victims."³⁷ Each prisoner must consent in writing to his transfer to Switzerland.³⁸

III. PROBLEMS UNDER THE AGREEMENT

Since May 1982, when negotiations were concluded, only nine prisoners have gone to Switzerland.³⁹ One prisoner escaped in July 1983 to the Federal Republic of Germany where he is seeking asylum.⁴⁰ The Swiss government holds the remaining prisoners in a "special camp" designed for Swiss citizens who commit minor infractions while on their annual three week military training.⁴¹ Conditions appear to be excellent. The prisoners have regular mail and access to the media.⁴² They have outings and opportunities to earn money. Their only visitors, however, are officials of the ICRC and Soviet authorities who may visit once every two months.⁴³

Human rights organizations such as Amnesty International and the International Commission of Justice have been denied visits to the camp.⁴⁴ These groups have become increasingly concerned about the prisoners, not because of prison conditions, but rather because of the issue of repatriation.⁴⁵ A spokeswoman for Freedom House has suggested that the lives of the prisoners may be endangered by sending them back to the Soviet Union.⁴⁶

The Soviet Union has asked for a pledge from the ICRC that it will in fact repatriate the prisoners.⁴⁷ The Soviets have a good legal argument that the soldiers in fact should be repatriated since the men agreed in writing to the arrangement, which includes repatriation at the end of two years. Moreover, the Soviet Union believes that international law requires forcible repatriation of prisoners of war. At the Geneva negotiating sessions, the Soviets pointed out that Article 118 of the prisoners convention requires forcible repatriation.⁴⁸

37. *Id.*

38. N.Y. Times, June 26, 1983, § 1, at 13, col. 1.

39. Ita, letter Dec. 28, 1983, *supra* note 1.

40. *Id.*

41. N.Y. Times, June 26, 1983, § 1, at 13, col. 1.

42. *Id.*

43. *Id.*

44. Christian Sci. Monitor, Sept. 1, 1983, at 6, col. 4.

45. *Id.*

46. Wall St. J., Sept. 21, 1983, at 32, col. 4; *see also* Wall St. J., Nov. 9, 1983, at 31, col. 4.

47. N.Y. Times, June 26, 1983, § 1, at 13, col. 1.

48. The article states that "[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities." Geneva Convention III, *supra* note 2. The Soviet Union argued for this interpretation again during the Korean prisoner repatriation controversy. *See also* Gutteridge, *The Repatriation of Prisoners*, 22 INT'L & COMP. L.Q. 207-16

The ICRC has made it clear that it rejects the Soviet Union's legal arguments and will not repatriate the prisoners against their wishes.⁴⁹ It says that its position is based, among other things, on "prevailing legal opinion regarding the problem of repatriation and the interpretation of Article 118 of the Third Geneva Convention."⁵⁰ It must be noted, however, that the ICRC has only said that *it* will not forcibly repatriate the prisoners. It says that at the end of internment any prisoner not wishing to return to the Soviet Union will come under Swiss jurisdiction; it will be for the Swiss government "to proceed in accordance with . . . legislation in force."⁵¹ In May 1984, two prisoners did return to the Soviet Union from Switzerland. It is assumed that they wished to return.

The Swiss have not yet said what they would do if a prisoner did not wish to return. They have been faced, however, with such a decision before. After World War II, approximately 9,000 Soviet soldiers who had escaped from German prisoner-of-war camps were in Switzerland. The Swiss government sent them back to the Soviet Union where Stalin had them exiled to Siberia.⁵² In light of this incident and of contemporary human rights principles, the soldiers should be granted asylum after their release from detention. There is, however, another important consideration. Granting asylum to Soviet prisoners would displease the Soviet Union, and thus would jeopardize the ICRC agreement and the lives of the prisoners held by the rebels in Afghanistan. This is the cost of allowing a few men to remain in Switzerland.

The ultimate fate of the prisoners is yet to be decided. This uncertainty may be why so few prisoners have agreed to go to Switzerland.⁵³ (After negotiations were completed, it was thought that hundreds would go within a few months.) Further, the rebels have stopped allowing the soldiers to be transferred to the ICRC and have charged that the Soviets have failed to fulfill their end of the bargain.⁵⁴

In August 1982, the ICRC was allowed to inspect prisons in Kabul. It interviewed 338 prisoners—as many as 60 without any other witnesses—at Pul-i-charki, Kabul's most infamous prison. The

(1953) for an account of the Korean controversy. The Soviets believe that prisoners of war are in no position to make a truly independent decision and should therefore be repatriated automatically. *Id.*

49. Ita, letter Mar. 20, 1984, *supra* note 1.

50. *Id.*

51. *Id.*

52. N.Y. Times, June 26, 1983, § 1, at 13, col. 1.

53. Christian Sci. Monitor, Dec. 28, 1982, at 5, col. 1.

54. Christian Sci. Monitor, Sept. 1, 1983, at 6, col. 1.

ICRC also visited "dozens" of other prisons, but after two months they were ordered to leave. Reports suggest that the Soviets were unhappy that so few prisoners had been transferred to Switzerland—by then only five or six had gone—and, presumably, this unhappiness triggered the expulsion.⁵⁵ On the other hand, the rebels may have sent only five or six to begin with because they were waiting to see a demonstration of Soviet good faith on the prison-inspection issue. At any event, ICRC officials say they are still working to gain entry to the prisons⁵⁶ and that neither party has revoked the agreement⁵⁷ though no action has been taken pursuant to it for more than two years.

IV. CONCLUSION

In practice, the ICRC agreement has proven anything but a glowing success. In fact, it seems to have all but broken down: a mere nine out of hundreds of prisoners have been transferred to Switzerland. Furthermore, the ICRC managed to spend only two months in Afghanistan touring prisons. From a legal standpoint, however, this agreement is a hopeful development. The approach taken in the agreement suggests new possibilities for enhancing the international law governing internal war. Moreover, it highlights a very basic question for lawyers working in this area: should efforts be directed toward developing ad hoc arrangements for particular conflicts? Or should the Afghan agreement be used as a foundation for a new, general convention on civil war? Jurists tend to think that war is no time to negotiate a treaty and that it is better to have them in place at the outset of hostilities. Yet ad hoc agreements may be the only type of agreement feasible in politically-charged civil wars. No matter which direction is taken, one feature of the Afghan agreement should definitely be preserved: the ICRC should continue its efforts to establish arrangements with those guerilla movements who feel that they can afford only to execute their prisoners.

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55. *Id.*

56. *Id.*

57. Ita, letter Mar. 20, 1984, *supra* note 1.

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